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ALEXANDER L. STEVAS,
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82-155

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CREDITHRIFT OF AMERICA, INC., Petitioner

vs.

THE UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether 11 U.S.C. § 522 (f) of the Bankruptcy Reform Act of 1978, allowing avoidance of certain liens on personal property, may be constitutionally applied to liens perfected after the enactment date (November 6, 1978) but before the effective date of the Act (October 1, 1979).

2. This case differs from Rodrock v. Security Industrial Bank, 642 F.2d 1193 (10 Cir. 1981) prob. jur. noted 50 U.S.L.W. 3486 (U.S. Dec. 15, 1981) (No. 81-184) in that Rodrock deals with pre-enactment date liens whereas this case deals with pre-effective date liens.

PARTIES

The United States was the intervenor at the Court of Appeals. Debtors Harry George Webber, Susan Marie Webber and

II

Everett Yoder Jr. and Elizabeth Yoder take no part in this appeal, the United States representing their interest in this matter.

PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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STATUTORY PROVISIONS INVOLVED

UNITED STATES CODE TITLE II:

§ 522(f)

No. _____

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v.

THE UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner Credithrift of America, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Apeals for the Ninth Circuit entered in this proceeding on April 14, 1982.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit appears in the Appendix hereto.

JURISDICTION

The expedited judgment of the Court of Appeals for the Ninth Circuit was entered on April 14, 1982. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is revoked under 28 USC § 1254 (1).[1]

STATUTORY PROVISIONS INVOLVED

UNITED STATES CODE TITLE II:

§ 522(f)

(f) Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the

[1] The United States was the intervenor at the Court of Appeals. Debtors Harry George Webber, Susan Marie Webber and Everett Yoder Jr. and Elizabeth Yoder take no part in this appeal, the United States representing their interest in this matter.

debtor in property to the extent that such impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is --

(1) A judicial lien; or

(2) A nonpossessory, nonpurchase-money security interest in any --

(A) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;

(B) implements, professional books, or tools, or the trade of the debtor or the trade of a dependent of the debtor; or

(C) professionally prescribed health aids for the debtor or a dependent of the debtor.

STATEMENT OF THE CASE

On July 2, 1979, defendant/appellant Credithrift made a loan to Everett and Elizabeth Yoder. The Yoders executed a note for $2,508.90, payable to

Credithrift, and signed a form pleding their household furnishings, goods and appliances as security for the loan. On July 23, 1979, Credithrift made a loan to Harry G. and Susan Marie Webber, who executed a note for $3,224.96 and signed a similar security agreement. The parties stipulated that each lien is a "nonpossessory, nonpurchase-money security interest" that arose after November 6, 1978 and before October 1, 1979.

The Webbers and Yoders subsequently filed petitions in bankruptcy on May 5, 1980 and July 1, 1980 respectively. Each couple sought to avoid the Credithrift liens in their exempt household goods pursuant to § 522(f)(2)(A). Credithrift asserted that § 522(f)(2)(A) cannot be constitutionally applied in these cases because the security interests were perfected prior to the effective date of

the Reform Act. The constitutional queston was certified to the Attorney General of the United States, who, through the United States Attorney, intervened, pursuant to 28 U.S.C. § 2043, in support of the constitutionality of the challenged provision.

On November 17, 1980 the bankruptcy court concluded in the Webber case that "§522(f)(2) is constitutional in so far as it applies to liens arising between November 6, 1978 and October 1, 1979, and the plaintiffs are entitled to the voiding of the defendant's lien on their household furnishings, household goods and appliances." In re Webber, 7 B.R. 580, 586 (Bkrtcy. D. Ore. 1980). A stipulated judgment was subsequently entered in the Yoder case allowing similar relief based upon the Webber decision. Both cases came to the Court of Appeals for the Ninth

Circuit on an expedited direct appeal pursuant to 28 U.S.C. § 1293(b). In the Court of Appeals for the Ninth Circuit and in this petition for review, the United States, in effect, represents the debtors.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS WELL AS OTHER COURTS AS TO THE PROPER INTERPRETATION OF 11 U.S.C. § 522.

As ably noted in the decision of the Court below, the Bankruptcy Courts and the Courts of Appeals are divided with respect to the retroactive applicability of § 522(f)(2)(A). Bankruptcy Courts in Oklahoma, Colorado, Oregon, Michigan, Washington, Kansas, and New Mexico have held that § 522 cannot be applied to liens perfected before the Reform Act's enactment date.[2] This holding was

[2] See In Re Pierce, 4 B.R. 671 (Bkrtcy. W.D. Okla. 1980); Rodrock v. Security Industrial Bank, 3 B.R. 629 (Bkrtcy. D. Colo. 1980) aff'd

followed by the Court of Appeals for the Tenth Circuit in Rodrock v. Security Industrial Bank, 642 F.2d 1193 (10 Cir. 1981) prob. jur. noted. So. U.S.L.W. 3486 (U.S. Dec. 15, 1981) (NO. 81-184), and by the Court of Appeals for the Seventh Circuit in In Re Gifford, 669 F.2d 468 (F. Cir. 1982).

Bankruptcy courts in Ohio, Utah and Wisconsin have held that § 522 (f)(2)(A)

642 F.2d 1193 (10 Cir. 1981) prob. jur. noted. So. U.S.L.W. 3486 (U.S. Dec. 15, 1981) (NO. 81-184); In Re Jackson, 4 B.R. 293 (Bkrtcy. D. Colo. 1980) aff'd 642 F. 2d 1193 (10 Cir. 1981) prob. jur. noted, So. U.S.L.W. 3486 (U.S. Dec. 15, 1981) (NO. 81-184); In Re Hawley, 4 B.R. 147 (Bkrtcy. D. Ore. 1980); In Re Malpeli, F B.R. SOB (Bkrtcy. N.D. Ill. 1980); In Re Woods, 9 B.R. 325 (Bkrtcy. E.D. Mich. N.D. 1981); In Re Ribb, 10 B.R. 40 (Bkrtcy. E.D. Mich. S.D. 1981); In Re Williams, 8 B.R. 40 (Bkrtcy. E.D. Wash. 1981); Schulte v. Beneficial Finance of Kansas, 8 B.R. 12 (Bkrtcy. D. Kan. 1980); Oldham v. Beneficial Finance, 7 B.R. 124 (Bkrtcy. D. N.M. 1980)

may be applied to pre-enactment liens.[3] This holding was followed by the Court of Appeals for the Third Circuit in In Re Ashe t/a C & S Fuel Service, 669 F.2d 105 3 Cir. 1982).

Bankruptcy courts in Tennessee, Illinois, Wisconsin, Nevada, Texas, Oregon, Colorado, Louisiana, Missouri, Kansas, Georgia and Ohio have held that § 522(f)(2)(A) may be applied to liens created after the Reform Acts enactment date but before its effective date, i.e. in the so called "gap" period.[4] Both Ashe

[3] See Matter of Rutherford, 4 B.R. 510 (Bkrtcy. S.D. Ohio W.D. 1980); In Re Ambrose, 4 B.R. 395 (Bkrtcy. N.D. Ohio 1980); In Re Curry, 5 B.R. 282 (Bkrtcy. N.D. Ohio 1980), aff'd., Curry v. Assoc. Financial Services, 11 B.R. 716 (N.D. Ohio E.D. 1981); In Re Sweeney, 7 B.R. 814 (Bkrtcy. E.D. Wisc. 1980); In Re Pillow, 8 B.R. 404 (Bkrtcy. D. Utah 1981).

[4] See In Re Head, 4 B.R. 521 (Bkrtcy. D. Tenn. 1980); In Re Beck, 4 B.R. 661 (Bkrtcy. C.D. Ill. 1980); In Re Sweeney, 7 B.R. 814 (Bkrtcy. E.D.

and Gifford supra, impliedly support this holding while Rodrock, supra, impliedly holds to the contrary.

Courts in Michigan, Washington, Oklahoma, Colorado (dealing with § 522(f)(1) - judicial liens) Kansas and

Wisc. 1980); In Re Bradford, 6 B.R. 741 (D. Nev. 1980) (dealing with § 522(f)(1) - judicial liens); In Re Brown, 7 B.R. 264 (Bkrtcy. N.D. Texas 1980); In Re Hawley, 4 B.R. 147 (Bkrtcy. D. Ore. 1980); In Re Seltzer, 7 B.R. 80 (Bkrtcy. D. Colo. 1980); Wells v. Person-to-Person Citicorp, 7 B.R. 875 (Bkrtcy. D. Colo. 1980); In Re Pape, 7 B.R. 443 (Bkrtcy. N.D. Fla. 1980); In Re Steinart, 4 B.R. 354 (Bkrtcy. W.D. La. 1980); Matter of Baker, 5 B.R. 397 (Bkrtcy. W.D. Mo. 1980), modified en banc, In Re Baker, 11 B.R. 125 (Bkrtcy. W.D. Mo. 1981); Matter of Primm, 6 B.R. 142 (Bkrtcy. D. Kan. 1980); Matter of Rutherford, 4 B.R. 510 (Bkrtcy. S.D. Ohio 1980)(by implication); In Re Ambrose, 4 B.R. 395 (Bkrtcy. N.D. Ohio 1980)(by implication); In Re Curry, 5 B.R. 282 (Bkrtcy. N.D. Ohio 1980)(by implication), aff'd., Curry v. Assoc. Financial Services, 11 B.R. 716 (N.D. Ohio 1981); Matter of Ward, 14 B.R. 549 (Bkrtcy. S.D. Ga. 1981).

Florida have held that the effective date is controlling and that § 522(f)(A)(2) cannot be applied to liens vested before that date.[5] It will be noted that the bankruptcy courts in Colorado and Kansas are themselves divided. In In Re Henderson, 10 B.R. 19 (Bkrtcy. N.D. Indiana 1980), the court ruled against giving retroactive effect to § 522 but left open the question of whether the controlling date was the enactment date or the effective date.

[5] See In Re Woods, 9 B.R. 325 (Bkrtcy. E.D. Mich. N.D. 1981); Matter of Bibb, 10 B.R. 40 (Bkrtcy. E.D. Mich. S.D. 1981); In Re Williams, 8 B.R. 562 (Bkrtcy. E.D. Wash. 1981); In Re Seiler, 8 B.R. 542 (Bkrtcy. W.D. Okla. 1981); Lucero v. Security Industrial Bank, 4 B.R. 659 B. Ct. D. Colo. 1980) (dealing with § 522(f)(1) - judicial liens; Schulte v. Beneficial Finance of Kansas, 8 B.R. 12 (Bkrtcy. D. Kan. 1980), aff'd., 642 F.2d 1193 (10 Cir. 1981), prob. jur. noted, 50 U.S.L.W. 3486 (U.S. Dec. 15, 1981) (No. 81-814); In Re Pape, 7 B.R. 443 (Bkrtcy. N.D. Fla. 1980).

Because this case came before the Court of Appeals on an expedited appeal and aside from what is implied in Ashe, Gifford and Rodrock, no appellate court other than in the present case has directly ruled on the applicability of § 522(f) to liens vested during the "gap" period. There is however considerable conflict among the decisions available for this court to decide to hear this case.[6]

It can be concluded from the opinion itself and the review of prior decisions in the present case that even the United States Court of Appeals for the Ninth Circuit is impliedly asking for guidance in this important question of Federal Bankrtupcy Law.

2. THE DECISION BELOW CONFLICTS WITH THE

[6] See also the attached opinion and the cases cited therein for an exhaustive review of the law to date.

DECISION OF THIS COURT IN LOUISVILLE JOINT STOCK LAND BANK V. RADFORD, 295 U.S. 555 (1935).

A full discussion of Radford and the conflicting decisions are contained in the decision of the Court of Appeals for the Ninth Circuit in this case.

Briefly, Radford held that the Frazier-Lemke Act was unconstitutional under the Fifth Amendment. This Court held that although the Court may discharge a debtor's personal obligations, it could not take for the benefit of the debtor, substantive rights in specific property acquired by the creditor prior to the Act 295 U.S. 594-95.

The present opinion appealed from allows such a taking of the vested property right from the creditor. This is contrary to the Radford decision. See the review of Radford contained in the opinion

attached hereto.

3. THE SITUATION IN THE PRESENT CASE IS SIMILAR TO ONE PRESENTLY BEFORE THE COURT AND INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW AND SHOULD BE DECIDED BY THIS COURT.

As noted in the attached Motions for Consideration (Appendix App. 21) this Court will be addressing the question of the applicability of 11 U.S.C. § 522 to pre-enactment liens. Rodrock v. Security Industrial Bank, prob. jur. noted 50. U.S.L.W. 3486 (U.S. Dec. 15, 1981) (NO. 81-184).

In the interest of completeness and expediency, this Court should also determine the applicability of § 522 to pre-effective date (but post-enactment date) liens such as those found in the present case.

CONCLUSION

For these reasons, a writ of

certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

July 20, 1982

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